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No. 80-1074

In the Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD W. VELDE, ET AL., PETITIONERS

v.

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. Respondents have sued former Attorney General Levi, former LEAA Administrator Velde, and two former subordinate LEAA officials for $20 million in compensatory and punitive damages because, in respondents' view, these officials did not take adequate steps to enforce the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968. Specifically, respondents challenge petitioners' failure to initiate fund termination proceedings against certain LEAA grantees. We contended in our opening brief that petitioners are absolutely immune from personal damages li-

ability based on these actions, relying on this Court's holding in *Butz* v. *Economou*, 438 U.S. 478, 515 (1978):

> We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. * * *
>
> The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.

Respondents have offered three principal reasons why petitioners are not entitled to absolute immunity from personal damages liability for their enforcement decisions.[1] First, respondents contend that this lawsuit "was not brought by a single disgruntled corporate official complaining [of] an individual administrative enforcement proceeding" (Br. 15) but rather challenges a "consistent policy and practice that bore no relation to individualized decisionmaking" (Br. 4) and "a wholesale refusal to exercise *any* of the meaningful enforcement tools available to [petitioners]" (Br. 15). Second, respondents as-

[1] Indeed, respondents' contentions go beyond the denial of absolute immunity. According to respondents (Br. 29), "petitioners here should be barred from claiming entitlement to any immunity whatsoever."

sert (Br. 29) that absolute immunity is intended "to encourage public officials to act, not to encourage them not to decide or not to act at all." Finally, respondents claim (Br. 17) that petitioners lacked any discretion in carrying out their statutory enforcement responsibilities.

1. We note at the outset that respondents' characterization of their claims is not borne out by the complaint or the record. The complaint details petitioners' extensive efforts to secure compliance with the governing anti-discrimination laws (J.A. 27, 28, 34-38, 41). The Velde Affidavit also explains petitioners' numerous attempts to assure that recipients of LEAA funds did not discriminate (J.A. 237-243; see also J.A. 294, 302). A fair reading of the prolix complaint is that respondents seek to hold petitioners liable in damages not for an across-the-board failure to act but for selecting one approach to civil rights compliance that emphasized voluntary resolution rather than another approach that sought to terminate funding at the earliest opportunity in every case. Similarly, respondents are incorrect in suggesting (Br. 22-23) that petitioners' failure to employ fund termination proceedings was the result of a rigid and unyielding policy rather than the exercise of discretion. The regulation that expressed the policy about which respondents complain, 28 C.F.R. 42.206 (a) (1973), did not expressly *preclude* fund termination proceedings, but instead indicated a *preference* for judicial proceedings when "the responsible Department official determines that judicial proceedings * * * are as likely or more likely to result in compliance than administrative proceedings * * *."

The more basic objection to respondents' arguments, however, is that they reflect a fundamental

misunderstanding of the absolute immunity defense and of the law enforcement process. Administrative enforcement officers, like prosecutors, are "duty bound to exercise [their] best judgment both in deciding which suits to bring and in conducting them in court." *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976). Absolute immunity from personal damages liability is essential to protect the public interest, because "agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment." *Butz* v. *Economou*, *supra*, 438 U.S. at 516. "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 424-425. As we pointed out in our opening brief (at 15-16, 24-25), the decision whether to bring a particular criminal or administrative proceeding, or which enforcement technique to pursue, often involves the application of a broad policy directive that extends more widely than a particular case. See, *e.g.*, *Thompson* v. *United States*, 444 U.S. 248, 250 (1980). *Rinaldi* v. *United States*, 434 U.S. 22, 24 n.5 (1977); *Redmond* v. *United States*, 384 U.S. 264, 265 (1966). Similarly, administrative and criminal law enforcement officials often decide not to initiate an enforcement proceeding, either in a particular instance or in a class of cases. Decisions of this kind are essential to the prosecutorial function. A rule that refused to extend absolute immunity to these situations would be wholly unresponsive to the concerns that prompted the decisions in *Imbler* and *Economou* and would skew the law

enforcement process. Respondents have offered no response to these arguments.[2]

2. Respondents contend (Br. 17-21) that petitioners are not entitled to absolute immunity from damages liability because they had no discretion in implementing the anti-discrimination provisions of the Act. We have already addressed this point in our opening brief (at 18-24). We note, however, that respondents assert only that "petitioners enjoyed

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[2] Respondents' rebuttal consists of two misstatements. First, they claim that our position would "swallow up the ruling in *Butz* * * * by renaming all of the administrators within LEAA's hierarchy who had any connection with its civil rights enforcement activities as 'prosecutors' " (Br. 14). We do not here challenge the general rule that Executive Branch officials normally are entitled only to a qualified immunity from damages liability. But when damages are sought from executive officials for their failure to impose governmental sanctions, particularly when those sanctions may be imposed only through formal enforcement proceedings, including notice and a hearing followed by judicial review (see 42 U.S.C. (1970 ed., Supp. V) 3757-3759), liability is predicated upon their action (or inaction) as administrative prosecutors, and they are entitled to absolute immunity under *Butz* v. *Economou*, *supra*, 438 U.S. at 515.

Second, respondents insinuate (Br. 26 n.28) that this Court limited its ruling in *Economou* to administrative or prosecutorial decisions *to bring charges*. The statement in *Economou* quoted by respondents obviously was intended to mean not that absolute immunity is unavailable for an administrative decision not to institute a proceeding, but only that persons complaining of such a decision face a variety of obstacles that ordinarily would make absolute immunity unnecessary as a protection against retaliatory lawsuits—obstacles of precisely the kind faced by respondents here (*e.g.*, no cause of action, no damages related to challenged government conduct). See *Leeke* v. *Timmerman*, No. 80-2077 (Nov. 16, 1981); *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973).

no discretion *once they determined that a grantee was not in compliance* with the nondiscrimination requirement in § 518(c)(1) of the Act" (Br. 17; emphasis added). That determination, of course, required the exercise of discretion. Moreover, even this concession by respondents does not accurately portray the statutory scheme, because funding termination could be predicated only on an administrative finding of "substantial" noncompliance and could be instituted only after affording the state chief executive "a reasonable time" to secure compliance (42 U.S.C. (1970 ed., Supp. V) 3757). It also bears repeating that Congress amended Sections 509 and 518 in 1976, after the events alleged in respondents' complaint had occurred, precisely because it thought that LEAA retained too much discretionary authority in this area. See, *e.g.*, H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 11, 25-27 (1976); 122 Cong. Rec. 28498 (1976) (remarks of Rep. McClory).[3]

3. Finally, respondents argue that petitioners should be denied absolute immunity because they did not describe themselves as "prosecutors" in their affidavits (Br. 15, 23-24), because of the purported

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[3] Respondents appear to imply (Br. 21) that absolute immunity is not available here because the Act authorizes imposition of only one sanction in a formal fund termination proceeding and does not authorize any civil penalty. The discretion involved in deciding whether to seek imposition of a fixed sanction is equally deserving of protection from extraneous influences (such as the fear of personal damages liability) as the discretion involved in deciding how large a fine should be imposed. Indeed, respondents' argument suggests that petitioners would not be absolutely immune from a suit by an aggrieved grantee seeking damages for an unsuccessful attempt to terminate funding after the required notice and hearing. This is plainly wrong.

"absence of adversarial checks" (Br. 26-27), and because otherwise respondents would have no "avenue of redress" (Br. 28). These contentions may be disposed of quickly.

It is irrelevant that petitioners' affidavits in the district court did not use the label "prosecutor" to describe their functions. The Court in *Economou* (438 U.S. at 515) remarked that agency officials often "perform[] certain functions analogous to those of a prosecutor," not that they are prosecutors in the criminal law enforcement sense. The essential consideration under *Economou* is "the special nature of [the officials'] responsibilities" (*id.* at 511), not the title given to their office. We have described in our opening brief (at 25-28) the roles of the various petitioners with regard to LEAA's funding termination responsibilities. Petitioner Rice was in charge of day-to-day compliance efforts and was plainly acting as a prosecutor, in the sense that the word "prosecutor" is used in *Economou* to identify the official who decides what proceedings to institute and when and how to conduct them (J.A. 245, 262-264). The other petitioners, up the chain of command, had broad supervisory and final decision-making authority over decisions to initiate enforcement actions, much like the role performed by the Attorney General or a United States Attorney in a typical criminal case (J.A. 236-243, 247-249, 253-254). There can be no doubt that these officials, to the extent that their actions are brought into question by respondents' complaint,[4] were performing

[4] One of the difficulties in grappling with respondents' objections to the lack of specificity in petitioners' affidavits is that respondents' complaint, which covers 34 pages and 112 paragraphs in the joint appendix, nowhere charges any spe-

roles "functionally comparable" to that of a prosecutor. *Butz* v. *Economou*, *supra*, 438 U.S. at 513. See also *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 423 n.20.

Moreover, respondents' reference to the "absence of adversarial checks" and the need for an "avenue of redress" is both factually and legally inaccurate. "Adversarial checks" obviously are designed to protect those against whom a government proceeding is initiated, not to protect persons who wish to see such a proceeding initiated but who are disappointed in their desires. Here, of course, there were procedural protections available to recipients of LEAA funds against whom the Department of Justice might have chosen to proceed as a consequence of a finding of

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cific petitioner with any specific action that allegedly damaged respondents and violated their constitutional rights. Rather, the complaint is essentially a blunderbuss attack on LEAA's enforcement policies during a span of several years and names the petitioners as defendants on the assumption that they, as the LEAA chain of command, must have been responsible for the formulation and implementation of those policies.

The crucial point is that respondents are seeking damages from these petitioners for their failure to terminate funding to allegedly discriminating grantees, a sanction that could be sought only after a discretionary determination that the sanction was justified (both as a matter of law and as a matter of allocating scarce prosecutorial resources) and that could be imposed only after formal notice and a hearing. 42 U.S.C. (1970 ed., Supp. V) 3757. To the extent that the individual petitioners were personally involved in the process that led to the decision to exhaust other remedies before resorting to termination in any particular case, they are entitled to prosecutorial immunity. (Contrary to the cases cited by respondents (Br. 27 n.29), these actions were not taken in an "investigative" or "administrative" role). To the extent that the individual petitioners were not involved in that process, they cannot be held liable for the wrong alleged.

substantial noncompliance with the Act. The analogy to criminal prosecutions is apt. There are no "adversarial checks" to protect victims of crime; that does not mean that a prosecutor may be sued for damages by a victim for a decision not to prosecute.

In any event, respondents did have access to a number of avenues of relief other than a *Bivens* action for damages. They challenged petitioners' conduct under the Administrative Procedure Act (a challenge that is still pending), and they complained to Congress that the Executive Branch was not being sufficiently forceful in its enforcement activities. Indeed, after respondents complained to Congress in 1976 (see *Law Enforcement Assistance Administration: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 94th Cong., 2d Sess., Pt. 1, 491-516), the Act was amended.

B. Respondents respond to our claim that the complaint failed to charge a violation of the Fifth Amendment by stating that we have "misinterpret[ed] the nature of the constitutional violation alleged by the" complaint (Br. 34-35). According to respondents (Br. 36), "the constitutional violations alleged here occurred not when discrimination was practiced by local recipients, but when the federal officials knowingly provided financial assistance which supported the race- and sex-based discrimination." [5]

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[5] Respondents criticize the petitioners (Br. 30-32 n.32) for failing to cite or discuss cases such as *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980). Respondents thus confuse the question of whether the Constitution has been violated (the issue in this case) with the wholly separate question whether a damages action should be implied by the courts to remedy a constitutional violation (the issue involved in *Bivens*, *Davis*, and *Carlson*). The *Carlson* analysis, which respondents explore at great

This Court has never held, however, that the mere knowing provision of funds to an entity that discriminates is a violation of the Constitution's equal protection guarantees. Rather, for respondents to establish a violation under the Due Process Clause, they must allege facts to show that petitioners' failure to terminate funding to the allegedly discriminating state agencies had the purpose and effect of significantly facilitating, supporting or reinforcing the discriminatory behavior. See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979); *Washington* v. *Davis*, 426 U.S. 229, 239-244 (1976). See also *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 384 n.3 (1978) (opinion of White, J.).[6]

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length, is simply irrelevant here: petitioners contend in this Court that their conduct did not violate respondents' Fifth Amendment rights, not that a violation (if proved) cannot be the subject of a damages action.

Respondents also mislead the Court in asserting (Br. 32 n.32) that the court of appeals has held that respondents have an express cause of action for damages under the Omnibus Crime Control Act. The sole authority cited by respondents is a footnote in the court of appeals' opinion (Pet. App. 7a n.16) that is addressed to the issue of respondents' *standing*. The court of appeals did not even purport to apply the analysis set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975), for determining whether Congress intended to allow plaintiffs such as respondents to bring suit for damages against LEAA officials based on allegations such as those in respondents' complaint. Respondents' claims in this Court thus rest on the Fifth Amendment alone.

[6] Several of the decisions cited by respondents as "reaffirming the *constitutional* principle that government agencies may not provide funding to recipients which are known to practice discrimination" (Br. 35-36 n.35; emphasis added) involve declaratory or injunctive relief for violation of statutory or

Norwood v. *Harrison*, 413 U.S. 455 (1973), and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974), are not to the contrary. Initially, it should be noted that both of these cases (which involved requests for injunctions rather than damages) were decided prior to *Washington* v *Davis*, *supra*. In addition, these cases arose in the context of state and municipal programs in Mississippi and Alabama that "benefited private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems." *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 163 (1978). See also *Gilmore* v. *City of Montgomery*, *supra*, 417 U.S. at 568, 570-571 n.10. Even in those situations this Court required more than mere knowing support to discriminating third parties to establish a constitutional violation. The record in those cases reflected a policy of "tangible financial aid" that had "a significant tendency to facilitate, reinforce and support private discrimination." *Norwood* v. *Harrison*, *supra*, 413 U.S. at 466. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 384 n.3.

Respondents' factual allegations are inadequate under this standard. Respondents fail to allege facts that show that petitioners purposefully encouraged, facilitated or significantly supported discriminatory

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administrative provisions. *Legal Aid Society of Alameda County* v. *Brennan*, 608 F.2d 1319 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980) (violation of Department of Labor regulations issued pursuant to an Executive Order); *Committee for Full Employment* v. *Blumenthal*, 606 F.2d 1062 (D.C. Cir. 1979) (violation of the Revenue Sharing Act of 1976, 31 U.S.C. 1242(a)); *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d). These cases did not purport to find any constitutional violation from the mere provision of a financial benefit.

behavior. Indeed, as we showed in our opening brief, the complaint indicates petitioners' extensive efforts, although perhaps in respondents' view inadequate and ineffective, to promote nondiscrimination. The mere contention that petitioners' failure to terminate funding "has served to * * * perpetuate" discrimination (J.A. 26) is insufficient to allege a constitutional violation.[7]

The theory of respondents' case leads to several anomalous results. If LEAA's mere failure to terminate funding to allegedly discriminating police departments amounts to a constitutional equal protection violation, then presumably so would the enactment of a statute by Congress or a state legislature appropriating funds for that law enforcement agency. This would be so even if Congress or the state legislature (like petitioners) had no intent to further the discrimination and, indeed, took steps to end it. This theory, of course, is directly contrary to the Court's holding in *Feeney* (442 U.S. at 279). Moreover, by repeatedly asserting (Br. 36, 39) that their injuries here are attributable *not* to the discrimination practiced by the local police departments but to

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[7] Unlike in *Norwood*, there was not even an allegation by respondents of a policy on the part of the federal government to support discriminatory behavior by police departments. Petitioners never took the position that it was permissible for grantee law enforcement agencies to discriminate. The only question was how best to bring funded agencies into compliance with the LEAA anti-discrimination guarantee (see J.A. 294, 298, 302).

Indeed, it is not clear from respondents' prolix complaint and accompanying materials that they have even alleged purposeful discrimination (as opposed to discriminatory effect) on the part of the grantee police departments. If the grantees' discrimination did not amount to a constitutional violation, then petitioners' actions plainly could not have violated respondents' Fifth Amendment rights.

petitioners' failure to enforce the Act by terminating funding, respondents are attempting to turn petitioners' alleged failure to satisfy their *statutory* obligations into a *constitutional* violation.[8]

In fact, because respondents claim to have been damaged by petitioners' actions *even if those actions had no effect on the discrimination allegedly practiced by LEAA grantees* (see Resp. Br. 36 & n.36, 39)[9]

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[8] It is not easy to grasp respondents' elusive Fifth Amendment theory, because respondents repeatedly refer to petitioners' "refusals to carry out their *constitutional and statutory* civil rights obligations" (Br. 39; emphasis added). If the Act did not contain an express fund termination provision, would respondents claim that petitioners nonetheless were under a constitutional obligation not to provide federal funds to grantees known to be practicing discrimination and that the refusal to fulfill that obligation violated respondents' Fifth Amendment rights? If the answer to that question is yes, then the statutory provision is irrelevant to this case. And if the answer to that question is no, then respondents (as mentioned in the text) are attempting to turn a statutory violation into a constitutional one.

[9] Respondents clearly describe their injury as "petitioners' refusal to carry out their constitutional and statutory civil rights obligations" (Br. 39; see also Br. 37 n.36). Respondents also claim that this is a constitutional injury wholly separate from the injury caused by the discrimination allegedly engaged in by LEAA grantees (Br. 36)—injury for which express statutory make-whole remedies are available against the grantees (see Pet. Br. 38-39)—and that they are entitled to damages from petitioners without even having to show that if petitioners had taken the actions respondents preferred the discrimination would not have occurred: "the petitioner government officials caused the injuries which respondents assert as the basis for their claim against *petitioners*; * * * the relief sought by respondents would remedy and compensate for the injuries caused by *petitioners'* transgressions: * * *

the fact that racial and sexual discrimination is involved here is really coincidental. Respondents' position (see Br. 12, 36-40) essentially is that, if the federal government does not prevent or prosecute a violation of the Constitution or federal law, persons aggrieved by the Executive Branch action should be able to sue the officials involved for a violation of constitutional rights. The Executive Branch has a duty to enforce the law, and respondents seem to believe that any deficiencies in the performance of that duty subject the officials involved to constitutional tort liability. This Court should reject that startling proposition.

C. Respondents contend that petitioners are not entitled to qualified immunity as a matter of law because (Br. 44) "respondents complained of petitioners' deliberate, willful and malicious refusal to carry out an effective civil rights enforcement program, in every respect" and because respondents disputed many of the allegations in petitioners' affidavits but were not allowed to engage in discovery to substantiate their beliefs.[10] The flaw in respondents'

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damages to redress petitioners' past violations" (Resp. Br. 39-40; emphasis in original).

We note in this regard that respondents' brief repeatedly attempts to rewrite the complaint to charge petitioners with "a wholesale refusal to exercise *any* of the meaningful enforcement tools available to them" (Resp. Br. 15). The complaint, however, clearly describes the "Nature of [Respondents'] Claim" as petitioners' decision to award federal funds to various grantees (J.A. 13), and the *only* injury alleged by each of the respondents is petitioners' "refusal to terminate LEAA funding" to these grantees (J.A. 14-15).

[10] Respondents do not seriously dispute our statement (Pet. Br. 40) that petitioners had no reason to know in 1974 and 1975 that their conduct violated respondents' "clearly estab-

argument is the assumption that the liberal rules of pleading and discovery that govern normal civil litigation apply with equal force in *Bivens* actions for damages against federal officials. To the contrary, this Court admonished the lower courts in *Butz* v. *Economou*, *supra*, 438 U.S. at 507-508 (citation and footnote omitted), that more stringent rules are to apply:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* [v. *Rhodes*, 416 U.S. 232 (1974)] that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. * * * In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

These principles strongly support the conclusion that this case should not have progressed beyond the pleading stage.

Respondents repeatedly refer (Br. 9, 15, 44, 48-50) to genuinely disputed issues of fact and to petitioners' failure to undertake any enforcement measures against grantees known to have practiced discrimi-

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lished" Fifth Amendment rights. See *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). Indeed, in February 1976 the Attorney General stated that "neither the Act nor policy of the Department of Justice encourages the termination of federal assistance without recourse to voluntary means" (J.A. 248).

nation, but they offer no facts to support their claims that these issues are disputed. Respondents also repeatedly disparage the petitioners' Statement of Reasons and affidavits in the record, but they do not offer any specific facts to rebut petitioners' material submissions. Respondents' complaint does include a boilerplate allegation—in the "Prayer for Relief" rather than the "Statement of the Claim" section of the complaint—that petitioners' actions were "willful and malicious" (J.A. 44), but this crucial charge, again, is not supported by anything other than innuendo and speculation. The complaint contains not a single factual assertion that would tend to prove willfulness or malice. And this is the sole explanation that respondents offer in their brief for the allegation that petitioners acted willfully and maliciously (Br. 33):

> Based upon their own experiences and contacts with the petitioners, respondents had every reason to believe that petitioners' conduct was "willful and malicious," and so they alleged.

We submit that these sorts of easily-made allegations, unsupported by specific facts, should not be enough to require federal officials (including, as in this case, the former Attorney General) to undergo a trial. Plaintiffs in *Bivens* actions should not be permitted to allege essential elements such as willfulness and malice without any elaboration, in the hope that they might be able to elicit evidence helpful to their case in depositions and discovery. To "ensure that federal officials are not harassed by frivolous lawsuits" (*Butz* v. *Economou*, *supra*, 438 U.S. at 508), complaints such as respondents' should be quickly dismissed.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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